IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	)	
	)	
ROBERT J. HORAN,	)	**Supreme Court #SC83960**
	)	
Respondent.	)	

INFORMANT'S BRIEF

OFFICE OF
CHIEF DISCIPLINARY COUNSEL

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ATTORNEYS FOR INFORMANT

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STATEMENT OF JURISDICTION

Jurisdiction over this attorney discipline matter is established by Article 5, section 5 of the Missouri Constitution, Supreme Court Rule 5, this Court's common law, and Section 484.040 RSMo 1994.

STATEMENT OF FACTS

Respondent attended the University of Missouri, Columbia, School of Law and was admitted to Missouri's Bar in 1986. **T.** 42-43. Respondent started out practicing almost entirely in the criminal law field. **T.** 44. At the time of hearing before the Disciplinary Hearing Panel, Respondent's practice was half criminal and half personal injury. **T.** 12. Respondent has always practiced solo, although he has sometimes employed other attorneys. **T.** 43-44. Respondent has an office on Manchester Ave. in St. Louis. **Ex.** 2.

For the five weeks encompassing October of 1998, Respondent mailed a solicitation letter to individuals who had been arrested on criminal charges. **T.** 16-17. The letter went out to from 2,000 to 2,500 people. **T.** 17. While Respondent continues to send solicitation letters, he stopped sending the 1998 letter, which appears as exhibit 2 in the record, because several friends told him it was awkward, and it offended a friend who worked as a public defender. **T.** 24-25, 26, 28, 38. The opening paragraph of the letter reads as follows:

> I defend <u>you!</u> You want to keep your record clean? You want to avoid jail? Who is going to represent your best interests? The public defender or <u>your</u> lawyer? Who can get you the better deal, the lawyer that the prosecutor knows is free or your experienced lawyer? You can not afford a Public Defender! You can afford me.

The director of the Missouri State Public Defender System made a complaint about the 1998 solicitation letter. **T.** 60-61, 65. Respondent made two written replies to the complaint. **Ex.** 3a, 3b. In his second reply letter, Respondent stated that he "made a comparison under the rule and there is a factual basis." **Ex.** 3b, p. 2.

Respondent contended at the hearing before the Disciplinary Hearing Panel that he was not comparing his services to those of public defenders in the letter. **T.** 22-23, 40. Respondent took the position at hearing that the comparison was between how prosecuting attorneys deal with private attorneys versus public defenders. **T.** 21-22. Respondent contended that the comparison of services between public defenders and private attorneys could be factually substantiated by his practice experience, by clients' own experience, and by what public defenders have told him. **T.** 35-36, 52, 54. Respondent had no studies or factual data to support the assertion that prosecuting attorneys deal more favorably toward an accused represented by a private attorney than one represented by a public defender. **T.** 36.

Respondent contended at hearing that the solicitation letter made no representations, either express or implied, about the quality of legal services provided either by Respondent or public defenders. **T.** 25-26. Respondent meant the sentence "You can not afford a Public Defender!" to be a pun or bad joke. **T.** 27.

Informant made an offer of proof that Respondent accepted admonitions in 1993 and 1995 for violations of Rule 4-7.2 (advertising). **T.** 15-16. The Panel did not admit the evidence and did not consider Respondent's prior disciplinary history as an

aggravating factor in recommending an appropriate sanction. The Panel based its exclusion of the evidence of prior disciplinary history on Rule 5.31. **T.** 157-158.

On March 26, 1999, Division I of the 21st Judicial Circuit Bar Committee (now the Region X Disciplinary Committee) wrote Respondent regarding a solicitation letter about which complaint had been made. **Ex.** A. The solicitation letter referenced in Division I's March 26, 1999, letter is attached to Exhibit A. Division I wrote Respondent that it did not find probable cause to believe that the solicitation letter was false or misleading, but Respondent was cautioned about several aspects of the letter and urged to adhere strictly to Rules 4-7.1, 7.2, and 7.3. Respondent was asked specifically to clarify the statement "I am your lawyer" and to enlarge the type size of the disclaimer printed at the bottom of the letter. **Ex.** A.

An information charging Respondent with violating Rule 4-7.1(d) and (e) was served on Respondent on January 24, 2001. Hearing was conducted before a Disciplinary Hearing Panel on July 7, 2001. The Panel issued its decision on July 24, 2001. The Panel found that the 1998 solicitation letter violated Rule 4-7.1(d) and (e) by implying that the quality of Respondent's legal services was superior to that rendered by public defenders and that the comparison of services could not be factually substantiated and was not susceptible to reasonable verification by the public. The Panel recommended an admonition. The Office of Chief Disciplinary Counsel did not concur in the Panel's recommendation for discipline, prompting the filing of the record in the Court pursuant to Rule 5.19(d).

POINTS RELIED ON

I.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT BECAUSE THE 1998 SOLICITATION LETTER IS FALSE AND MISLEADING IN VIOLATION OF RULE 4-7.1(d)(e) IN THAT RESPONDENT COMPARED THE QUALITY OF HIS LEGAL SERVICES TO THOSE RENDERED BY PUBLIC DEFENDERS WITHOUT BENEFIT OF FACTUAL SUBSTANTIATION AND EXPRESSLY OR IMPLIEDLY REPRESENTED FACTS ABOUT THE QUALITY OF LEGAL SERVICES WHEN THOSE FACTS WERE NOT SUSCEPTIBLE TO REASONABLE VERIFICATION BY THE PUBLIC.

G. Hazard and W. Hodes, The Law of Lawyering §7.1:401(2d ed. 1998 supp.)

Rule 4-7.1(d)(e)

Stiffelman v. Abrams, 655 S.W.2d 522 (Mo. banc 1983)

State v. Windmiller, 579 S.W.2d 730 (Mo. App. 1980)

POINTS RELIED ON

II.

THE SUPREME COURT SHOULD PUBLICLY REPRIMAND RESPONDENT BECAUSE AN ADMONITION IS NOT A SUFFICIENT SANCTION IN THAT RESPONDENT HAS BEEN ADMONISHED TWICE ALREADY FOR RULE 4-7 VIOLATIONS.

Rule 4-7.1(d)(e)

Rule 5.31

A.B.A. Standards for Imposing Lawyer Sanctions (1991 ed.)

State ex rel. Anderson v. Witthaus, 102 S.W.2d 99 (Mo. banc 1937)

Black's Law Dictionary (4th ed. 1968)

ARGUMENT

I.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT BECAUSE THE 1998 SOLICITATION LETTER IS FALSE AND MISLEADING IN VIOLATION OF RULE 4-7.1(d)(e) IN THAT RESPONDENT COMPARED THE QUALITY OF HIS LEGAL SERVICES TO THOSE RENDERED BY PUBLIC DEFENDERS WITHOUT BENEFIT OF FACTUAL SUBSTANTIATION AND EXPRESSLY OR IMPIEDLY REPRESENTED FACTS ABOUT THE QUALITY OF LEGAL SERVICES WHEN THOSE FACTS WERE NOT SUSCEPTIBLE TO REASONABLE VERIFICATION BY THE PUBLIC.

Rule 4-7.1(d) strictly proscribes a lawyer from making comparisons in communications about the lawyer's legal services because quality is "so hard to judge that simplistic statements about it are very likely to be misleading." *G. Hazard and W. Hodes*, The Law of Lawyering §7.1:401(2d ed. 1998 supp.). It is difficult to conceive of a more simplistic comparison of services than that which appears in exhibit 2: "Who is going to represent your best interests? The public defender or your lawyer? Who can get you the better deal, the lawyer that the prosecutor knows is free or your experienced lawyer? You can not afford a Public Defender! You can afford me." This language is a clear comparison between the legal services the letter's recipient could obtain from

Respondent and those the recipient could obtain from public defenders. It likewise represents, or at the very least implies, that the recipient of the communication will be better served by the Respondent. If there were any question that the comparison drawn is between public defenders and Respondent, it is noted that further down in the letter, Respondent identifies himself in bold and large type as "your lawyer."[1]

The two subsections to Rule 4-7.1 that Respondent has been charged with violating provide an out to the lawyer who wishes to avoid the charge that his communication is false and misleading: the lawyer can compare services if the comparison can be "factually substantiated." And, a representation about the quality of legal services would pass muster if "susceptible to reasonable verification by the public." Respondent acknowledged in his testimony before the Disciplinary Hearing Panel that he had no data or studies to substantiate the letter's assertions. Respondent acknowledged that he had no factual substantiation for the claims that public defenders did not represent their clients' best interests, or help keep their records clean, or help them avoid jail time. Rather, Respondent claimed that the letter's comparisons could be substantiated by anecdotal evidence, i.e., by talk between potential clients and by discussions he has had with prosecuting attorneys and practicing lawyers. Or, Respondent suggested that people

[1] It should be noted that Respondent was cautioned by the Division I Committee in March of 1999 that the statement "I am your lawyer" in a like solicitation letter could "easily be misunderstood as an assertion that an attorney-client relationship somehow already exists."

could substantiate his claims by searching courthouse records or observing legal proceedings.

If anecdotal evidence were sufficient to meet the proscriptive exceptions, then subsections (d) and (e) would have no substantive effect. If all the attorney need do to show "factual substantiation" for his legal services comparisons is refer to courthouse gossip or advise his potential clients to talk to their neighbors or family members, then the Rule is meaningless, not a construction favored in the law. See *Stiffelman v. Abrams*, 655 S.W.2d 522, 531 (Mo. banc 1983). Cf. *State v. Windmiller*, 579 S.W.2d 730, 732 (Mo. App. 1980) (rules of construction are same for Supreme Court Rules and legislative enactments). Likewise, "reasonable verification" does not anticipate referring the letter's recipients to courthouse records or courtroom galleries to substantiate the lawyer's representations. Indeed, the Comment to Rule 4-7.1 makes reference to "underlying studies or other data," information Respondent has admitted lacking.

The letter Respondent mailed to between 2000 and 2,500 people violates Rule 4-7.1(d)(e), and Respondent should be sanctioned for violating the Rule. The question of the appropriate sanction, and whether Respondent's prior admonitions should be considered in sanction analysis, is considered in Point II.

ARGUMENT

II.

THE SUPREME COURT SHOULD PUBLICLY REPRIMAND RESPONDENT BECAUSE AN ADMONITION IS NOT A SUFFICIENT SANCTION IN THAT RESPONDENT HAS BEEN ADMONISHED TWICE ALREADY FOR RULE 4-7 VIOLATIONS.

The Disciplinary Hearing Panel did not admit Informant's evidence of Respondent's prior admonitions early in the hearing for the reason that the Panel wanted to hear the evidence first on whether Respondent had violated the Rules. After the Panel announced its findings that Respondent did violate Rule 4-7.1(d)(e) by comparing his legal services to other lawyers' and representing that his services were superior, the Panel stated it would not consider the evidence of Respondent's prior discipline as an aggravating factor in its sanction analysis. The Panel based its decision on the reasoning that under Rule 5.31 the 1993 and 1995 admonitions were closed records. The two subsections of Rule 5.31 upon which the Panel may have relied in considering the admonitions "closed records" are (b) and (d). Careful reading of those subsections, as well as consideration of the A.B.A. Standards for Imposing Lawyer Sanctions and this Court's consideration of disciplinary history in sanction analysis demonstrates the error of the Panel's reasoning.

Rule 5.31 does not foreclose a Disciplinary Hearing Panel from considering prior discipline, or more specifically, admonitions more than three years old, in its deliberations. Subsection (b) identifies three categories of records that are not public unless the Court so orders or the subject lawyer so requests. Those three categories are:

1. records developed prior to a lawyer's acceptance of an admonition (see Rule 5.11(b))
2. records developed before a Disciplinary Hearing Panel makes a finding that a lawyer has violated Rule 4 and before that decision is filed with the Court (see Rule 5.19(c)(d)); and
3. records developed before an information is filed directly in the Court (see Rules 5.20, 5.21, 5.23, 5.24).

A three plus year old accepted admonition does not fall within any of those three categories.

Subsection (d) provides that the records of letters of admonition are closed and not available to the public after three years from the date the lawyer accepted the admonition. When viewed in the context of the A.B.A. Standards and this Court's decisions, where prior discipline is an important factor in sanctions analysis, it is clear that the Court did not intend to preclude Panel members and those involved in disciplinary proceedings from considering evidence of admonitions more than three years old. As the Court said in the context of analyzing what constitutes a "common carrier," "'public does not mean everybody all the time.'" *State ex rel. Anderson v. Witthaus*, 102 S.W.2d 99, 102 (Mo. banc 1937) (quoting from *Spontak v. Public Service Commission*, 73 Pa. Super. 219).

The word "public" in Rule 5.31 does not include those participating in a disciplinary proceeding being conducted against the previously admonished attorney, but is used in the sense of applying to so many of a place as to contradistinguish them from a few. Black's Law Dictionary 1393 (4th ed. 1968).

The A.B.A. Standards specifically recognize prior disciplinary offenses and a pattern of misconduct as circumstances that may be considered in aggravation of the sanction appropriate to the misconduct. Standard 9.22. Because Respondent has already been admonished twice for Rule 4-7 violations, Informant believes that a third violation merits a public reprimand.

CONCLUSION

It has been shown by a preponderance of evidence that Respondent violated Rule 4-7.1(d) and (e). While an admonition might be the appropriate sanction absent the presence of aggravating circumstances, public reprimand is the sanction appropriate in this case because Respondent has been admonished twice already for violations of Rule 4-7.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of October, 2001, two copies of Informant's Brief have been sent via First Class mail to:

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_____
Sharon K. Weedin

CERTIFICATION: SPECIAL RULE NO. 1(c)

I certify to the best of my knowledge, information and belief, that this brief:

1. Includes the information required by Rule 55.03;

2. Complies with the limitations contained in Special Rule No. 1(b);

3. Contains 2,589 words, according to Microsoft Word 97, which is the word processing system used to prepare this brief; and

4. That Norton Anti-Virus software was used to scan the disk for viruses and that it is virus free.

_____
Sharon K. Weedin